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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1587

ZINNAMON ASSOCIATES, ET AL., ETC.,
Respondents,

versus

RALPH W. SWAFFORD,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No.

ZINNAMON ASSOCIATES, ET AL., ETC.,
Respondents,

versus

RALPH W. SWAFFORD,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, RALPH W. SWAFFORD, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on December 21, 1973.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, as yet unreported, appears as Appendix D, infra, pp. 7a. A petition for rehearing and petition for rehearing en banc, which was timely filed in the United States Court of Appeals for the Fifth Circuit, was denied with written opinion on the 31st

day of January, 1974. This opinion is as yet unreported and appears as Appendix C. pp. 4a-6a. The case at bar is an appeal from the United States District Court for the Western District of Texas, El Paso Division; no opinion was written by the trial court.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 21, 1973. A petition for rehearing and petition for rehearing en banc was timely filed. On January 31, 1974, the petition was denied by the United States Court of Appeals for the Fifth Circuit. This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is the due process clause of the United States Constitution met when a trial is carried out in the absence of a judge and a decision is rendered by said judge substantially affecting the rights of the individuals involved?

2. Does a litigant waive his right to complain of the failure of the trial judge to be present during his trial when the trial is to the bench by not objecting to it at the time and, therefore, in effect, allowing a trial to be held with only the attorneys and litigants present?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall .... be deprived of life, liberty, or property without due process of law...."

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are found in the transcript and summarized as viewed most favorably from the respondent's position in this case by the United States Court of Appeals for the Fifth Circuit (Appendix C, pp. 4a-6a), and that such interpretation of the facts is in a light most favorable to the respondent.

In addition to the facts as stated in the court's opinion, your petitioner, RALPH W. SWAFFORD, would point out to the Court that, in the trial court, neither party, in fact, had a full hearing before the court; therefore, much of the testimony amounted to no more than depositions taken before the court reporter then being made available to the court for use in coming to its final judgment. Oftentimes the testimony generated into no more than arguments between the counsel of both parties and the witnesses. In this atmosphere, it was impossible for there to exist any kind of orderly taking of testimony and examination of witnesses. In order for this Honorable Court to determine whether or not to grant certiorari, respondent will

quote directly from the transcript of the proceedings in the trial court as they occurred.

Q Where is that written agreement contained, is it contained in these minutes you brought with you?
A No, no, no, this is in the files of the company with the secretary of the board, Mr. Vasquez Perez.
Q But you knew before coming here that this was a battle between my client and Mr. Swafford —
A What the hell do you want me to do —
Q Just a minute, I'd like to finish my question —

MR. CHAGRA:
Wait a minute now, I'm not going to put up with you arguing with him there.

[76] MR. KERMAN:
Well I want to finish my question before you start answering.

MR. CHAGRA:
Well I'm not going to put up with it —

MR. KERMAN:
I don't care what you are going to put up with, Counsel, I'll do my examination —

THE INTERPRETER:
Don't put that on the record.

MR. CHAGRA:
We'll just call the Judge, that's all.

MR. KERMAN:
Call him.

MR. CHAGRA:
Well you call him but he ain't answering another question for you, I'm tired of your crap.

MR. KERMAN:
He's not your client, he's a witness.

MR. CHAGRA:
Come on down, Mr. Cortez, let Judge Guinn rule on it, come on.

MR. KERMAN:
The Judge instructed you, sir, to answer every question unless it was going to incriminate you.

MR. CHAGRA:
Just come on down and I'll be responsible for it, he's not going to take your abuse.

MR. KERMAN:
I won't abuse the man.

MR. CHAGRA:
Well then start over, discontinue abusing him, he can stay there but if you continue abus-

ing him he's going to come down and we'll let Judge Guinn rule.

A I'll answer your questions if you ask me in a gentleman manner. Now, don't point your finger at me and say you did this and you didn't do that I'll step out of this thing and I'll just leave whether you like it or not.

[77] Q (By Mr. Kerman) Mr. Cortez, I'll try not to ask you any questions that will incriminate you.

A You won't incriminate me because I'm not a criminal so I can not be incriminated.

(App., pp. 146, 147, 148)

MR. CHAGRA:

I won't without orders from the Court.

Q (By Mr. Kerman) All right —

A I say I have it at home, I may not have.

Q Yes, sir, I understand that. I don't accept anything you say at full-face value.

MR. CHAGRA:

Hey, look, we are not going to put up with that. I really — If you want to ask questions in a gentlemanly manner without arguing or making insinuations, fine, if you don't, I swear to God we'll walk out of here and we'll ask Judge Guinn to read what kind of comments you are making.

MR. KERMAN:

The Judge is going to read the record.

MR. CHAGRA:

I'm just telling you, one more comment like that and we are leaving.

MR. KERMAN:

Mr. Chagra, don't threaten me.

MR. CHAGRA:

I'm not threatening — let's go.

MR. KERMAN:

Let me ask you this, do you refuse to answer another question.

MR. CHAGRA:

We are leaving. You call Judge Guinn up here, Mr. Prieto, I'm going to call you as a witness. This isn't Washington, you don't impress or scare anybody.

MR. KERMAN:

For the record, I have no further questions [139] of this witness and other than placing certain documents in evidence and perhaps taking testimony of two other rebuttal witnesses, I'll have no further need for him. We are not terminating — the Plaintiffs are not terminating this hearing today, we are going to go forward with our evidence rebuttal witnesses.

(App. pp. 199, 200)

In addition to facts previously stated and the facts stated by the United States Court of Appeals for the Fifth Circuit, the last and most crucial hearing in the matter was carried on outside the presence of the trial judge and the court was adjourned by the interpreter without Judge Guinn being present, in the following manner:

> THE INTERPRETER:
> Let the record reflect that adjournment was called at four forty-five by order of Judge Guinn.

(App. p. 204)

There were no further proceedings had in the matter.

REASONS FOR GRANTING THE WRIT

1. *The decision below directly conflicts with the Due Process Clause of the United States Constitution.*

Your respondent would show this Honorable Court that, in his trial below in the District Court, that the Judge of the United States District Court left the courtroom and allowed the proceedings to go on without his presence. Testimony taken outside the presence of the Court was then used to determine the relative rights of the parties. The Court was not present to rule on objections to the propriety of certain questions; therefore, neither party had a hearing before the court. Much of the testimony, therefore, amounted to no more than depositions taken by a court reporter and then being made available to the court for use in coming

to its final judgment. Oftentimes the testimony generated into no more than arguments between the counsel to both parties and the witnesses. In this atmosphere, it was impossible for there to exist any kind of orderly taking of testimony and examination of witnesses and the due process clause of the United States Constitution was totally ignored. It is impossible for respondent to present to the Court the whole atmosphere in the trial without the Appendix. Appellant has, therefore, attached the Appendix of all of the testimony taken in this cause and the circumstances under which it was taken to this Petition for a Writ of Certiorari. It is clear from the Appendix that there never was any trial on the merits, as the whole proceedings seem to be loosely held upon three different transcripts. It is only too clear that, if this Court fails to grant certiorari in this case, confused proceedings such as this will now be given full color of law as in the District Court in this case, and further that all trials to the court can now be held in the court's absence without failing to lack due process. Your respondent has not been able to find any cases directly in point; however, the District Court cases of *Moore vs. United States*, 59 F.Supp. 660 (1945) and *Kaufman vs. Atlantic Greyhound Corporation*, (D.C.-W. Va.) 41 F.Supp. 252 (1941) clearly show that due process is required in the trial of civil cases. The United States Court of Appeals held that objections must be made and that these issues cannot be raised for the first time on appeal. In the opinion of respondent, this is an issue going to the very core of the United States Constitution and should be able to be raised at any time as the respondent in

this case, and the petitioners, were totally denied due process of law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

LEE A. CHAGRA
Attorney for Petitioner
616 East San Antonio Street
El Paso, Texas 79901

JOSEPH A. CALAMIA
Of Counsel
1604 State National Plaza
El Paso, Texas 79901

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition has been served upon opposing counsel, by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

JOSEPH A. CALAMIA

APPENDIX A

NOTICE OF APPEAL FROM FINAL JUDGMENT

Filed: Mar 1, 1973

In the United States District Court for the
Western District of Texas — El Paso Division

Zinnamon Associates, et al,
Plaintiffs
versus No. EP-71-CA19

Ralph K. Swafford,
Defendant

TO THE HONORABLE JUDGE OF SAID COURT:

Notice is hereby given that RALPH K. SWAFFORD, Defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 31st day of January, 1973.

Dated: March 1st, 1973.

Respectfully submitted,
CHAGRA & CHAGRA
Attorneys for Defendant
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El Paso, Texas 79901
/s/ LEE A. CHAGRA
LEE A. CHAGRA

APPENDIX B

JUDGMENT

Filed: Jan. 31, 1973

In the United States District Court for the
Western District of Texas, El Paso Division

Zinnamon Associates, et al.,
Plaintiffs,
versus No. EP-71-CA-9

Ralph K. Swafford,
Defendant.

Upon consideration of all of the pleadings, documentary evidence and testimony in the above-captioned cause, Defendant, Ralph K. Swafford, having represented to this Court that he is in possession of Stock Certificates representing forty-five percent (45%) of the stock of Beneficiadora de Minerales de Tlaxcala, S.A., and this Court having enjoined said Defendant, Ralph K. Swafford, from, in any manner, disposing of said Stock Certificates, and having found that Plaintiffs are entitled to the aforesaid Stock Certificates, it is, by the United States District Court for the Western District of Texas, El Paso Division, this 31st day of January, 1973,

ADJUDGED, ORDERED and DECREED, That Defendant, Ralph K. Swafford, deposit the aforesaid Stock Certificates representing forty-five percent

(45%) of the stock of Beneficiadora de Minerals de Tlaxcala, S.A., into the registry of this Court, not later than thirty days, to be then delivered by the Clerk of this Court to the Plaintiffs herein.

IT IS FURTHER ORDERED, ADJUDGED and DECREED, That judgment be, and the same is hereby, entered in favor of all Plaintiffs against the Defendant, Ralph K. Swafford, for the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED and DECREED, That Plaintiffs and The Aetna Casualty and Surety Company as surety be and they are hereby discharged from any liability to Defendant on the Bond filed herein on the 20th day of January, 1971, relating to the Temporary Restraining Order and Preliminary Injunction Orders heretofore issued by the Court in these proceedings.

Defendant in open Court, gives Notice of Appeal to the Fifth Circuit.

/s/ ERNEST GUINN
ERNEST GUINN,
United States District Judge

APPENDIX C

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ZINNAMON ASSOCIATES et al., etc.,
Plaintiffs-Appellees,

v.

Ralph W. SWAFFORD,
Defendant-Appellant.

No. 73-1984.

United States Court of Appeals,
Fifth Circuit.

Jan. 31, 1974.

Appeals from the United States District Court for the Western District of Texas.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC [Opinion December 21, 1973, 5 Cir. 1973, ____ F.2d ____].

Before BELL, DYER and CLARK, Circuit Judges.

PER CURIAM:

Appellant urges us to grant his petition for rehearing because, during the trial of the cause, the judge left the courtroom while testimony was being taken and thus was not present to rule on objections or hear evidence upon which the rights of the parties were determined.

A bench trial was held on August 14, 1972, with the judge present during the entire proceedings. At the conclusion of the trial the court held that the appellees were entitled to relief. Nevertheless, because of the representation of appellant that he had another witness and certain documents that were then unavailable, the court adjourned the trial for one week.

On August 21, 1972, appellant produced his witness but no documents. On this occasion the judge was present during the entire direct examination and through part of the cross examination of appellant's witness. He then informed counsel that he had a jury case going in another courtroom and inquired of them whether they desired to take a recess or continue the taking of testimony without him before another reporter.

Counsel for appellee expressd his desire that the judge be present during his cross examination of the witnesses. Counsel for appellant not only did not object to going forward with the bench trial in the absence of the judge but resuested that he be given the privilege of reserving all objections, to be made to the court after the testimony was transcribed. The court advised counsel that he would be available downstairs if a question came up, that a final ruling would be held in abeyance until the transcript was filed and he had an opportunity to read it and consider any objections then to be made by counsel.

Under these circumstances, while we abjure the judge's absenting himself from the courtroom during

the bench trial (even though he was engaged in another trial), appellant made no objection to the court's deposition type proceeding and may not therefore now raise this issue for the first time on appeal.

> In the absence of exceptional circumstances where a miscarriage of justice would result, a condition not present here, questions that were not presented to or passed on by the trial court will not be considered on appeal. Wisconsin Barge Line, Inc. v. Coastal Marine Transport, Inc., 414 F.2d 872 (5th Cir. 1969); B & G Electric Co. v. G. E. Bass & Co., 252 F.2d 698 (5th Cir. 1958). *See also* J. F. White Contracting Co. v. New England Tank Industries, 393 F.2d 449 (1st Cir. 1968).

D. H. Overmyer Co. v. Loflin, 440 F.2d 1213 (5th Cir. 1971).

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 15 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is denied.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1984

ZINNAMON ASSOCIATES, ET AL., Etc.,
Plaintiffs-Appellees,
versus

RALPH W. SWAFFORD,
Defendant-Appellant.

Appeals from the United States District Court for the Western District of Texas

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(December 21, 1973)

Before BELL, DYER and CLARK, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1587

ZINNAMON ASSOCIATES, *et al.*, etc.,

Respondents,

v.

RALPH K. SWAFFORD,

Petitioner.

Appeal from the United States District Court
for the Western District of Texas at El Paso

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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v.

RALPH K. SWAFFORD,

Petitioner.

Appeal from the United States District Court for the Western District of Texas at El Paso

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Respondents, ZINNAMON ASSOCIATES, respectfully submit that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on December 21, 1973, should be denied.

OPINIONS BELOW

After a series of hearings and a full trial in the United States District Court for the Western District of Texas at El Paso, judgment was rendered in favor of the Respondents. Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. The unpublished opinion (487 F.2d 1400), was a *per curiam* affirmance of the judgment below. Subsequently, at the request of Petitioner, a written opinion was rendered by the United States Court of Appeals for the Fifth Circuit on January 31, 1974, and published at 488 F.2d 863 (Appendix C to Petition, pp. 4a-6a).

As evidence of Petitioner's lack of good faith in prosecuting his appellate remedies, his counsel did not even bother to appear for argument of that appeal, in spite of his written acknowledgement to the Court that he had received notice of the date of said hearing. The instant Petition is a further unjustifiable effort on the part of Petitioner to delay compulsory compliance with the Injunctive Order issued by the Trial Court, since the Trial Court has refused to enforce the same until all appeals have been exhausted.

QUESTION PRESENTED

Has Petitioner been denied due process by electing to proceed with the conclusion of testimony, in the absence of the Trial Judge, and in the nature of a deposition which would be read and considered before Judgment was entered?

STATEMENT OF FACTS

On January 20, 1971, this action was instituted by the filing of a Complaint For Temporary Restraining Order, Preliminary and Permanent Injunctions and Other Relief. On February 10, 1971, after full hearing (on January 26, 1971), a Preliminary Injunction was entered and trial was scheduled on the merits for March 1, 1971. A subsequent pretrial hearing was held in this case on March 9, 1971, and trial was delayed until August 14, 1972. On that latter date all parties appeared and testified in full. At the conclusion of that trial Defendant, recognizing that his position was precarious, at best, begged the Court for a continuance during which he would seek to secure a witness who was a citizen and resident of Mexico, as well as certain documentary evidence he claimed was physically located in Mexico City and would prove some of his unsupported contentions. The Court advised Defendant that he would be given one week within which to secure such testimony and documentary evidence and would be afforded one last opportunity to attempt to persuade the Court that his contentions were valid. All parties were instructed to appear again on August 21, 1972, for Defendant's final presentation of evidence and Plaintiffs were further instructed to prepare Findings of Fact and Conclusions of Law consistent with the Court's previous oral expressions.

On August 21, 1972, all parties appeared and Defendant produced one witness, but no documentary evidence. The Trial Court sat patiently through Defendant's final presentation of testimony and was obviously not persuaded to alter its findings thereby. Having no way to anticipate the Court's reaction to this additional direct testimony, Counsel for Plaintiffs wished to proceed with cross-examination of Defendant's last witness as well as to offer rebuttal testimony.

The Trial Court, in order to accommodate Defendant in this one-week continuance, had interrupted a jury trial which was then in progress and did not feel that that jury trial could be further delayed in order to complete prolonged cross-examination of Defendant's Mexican witness. At that point, the Court offered counsel for both sides an opportunity to elect to recess this case once again, or, in the alternative, to proceed with cross-examination in the nature of a deposition which would be transcribed, read and considered before final determination of this action was made. Pertinent portions of the colloquy between Court and counsel are as follows:

[For Defendant-Petitioner – Mr. Chagra
For Plaintiffs-Respondents – Mr. Kerman]

App. 342. THE COURT: Just a minute, gentlemen. I have a jury case going on downstairs. Do you want to take a recess or do you want to get a Court Reporter and go and take this testimony in detail, because I know you are going to have a prolonged examination.

App. 343. MR. KERMAN: Yes, Your Honor, I think there may be some required Court rulings on evidence during the testimony, though.

THE COURT: Well, you can go ahead and answer so far as you know and then I will pass on whether it should be admitted.

App. 350. THE COURT: All right.

I want you to understand that you will not be objecting on the grounds that it is immaterial or irrelevant. I will pass on that later.

MR. CHAGRA: Your Honor, for the sake of time, may we at this time not make objections and after it is typed up make objections at that time?

THE COURT: That is what I am saying.

[107] MR. CHAGRA: In other words I don't have to object to the question if I think it is improper, I don't waive it.

THE COURT: That's right, you don't waive it.

MR. KERMAN: Thank you, Your Honor.

As can be seen from the foregoing, Counsel for Petitioner (Mr. Chagra) was perfectly satisfied with the manner in which these proceedings were to be conducted, and made no objection whatever to the same. On January 31, 1973, in open court, the Trial Judge reviewed his proposed Judgment in this action and afforded both sides an opportunity to discuss their views on the testimony taken by deposition. This proceeding appears in the record as follows:

[For Plaintiffs-Respondents – Mr. Galatzan]

JANUARY 31, 1973

App. 353. THE COURT: All right, Judge Galatzan have you given Mr. Chagra a copy of the proposed judgment?

MR. GALATZAN: I haven't, Your Honor. I will hand him one.

THE COURT: If you have another copy, give one to [110] Mr. Swafford so he can be reading it too.

> Now I will hear discussions on this and also if you care to review that testimony taken by the depositions, Mr. Chagra.
>
> Do you wish to state your position about this first, Judge Galatzan? You can do it briefly and then let's hear from Mr. Chagra.
>
> MR. GALATZAN: We have nothing, Your Honor, at this time other than what the order provides.
>
> THE COURT: Mr. Chagra? You have looked at it. Give me your views about this.
>
> App. 354. MR. CHAGRA: Your Honor, I have not received the deposition yet but I am aware of what is in it.
>
> THE COURT: Yes, sir. I am aware of the testimony.

Not only was this testimony taken by agreement, but no Judgment was entered until after the Trial Judge had read a transcript of the same and given counsel for both sides full opportunity to discuss that testimony in open court. At no time during either the colloquy, in which procedures were established for the taking of that testimony, or during the hearing on January 31, 1973, did Petitioner's Counsel indicate any displeasure with the procedure which had been utilized with his consent. It is only now, when Petitioner finds himself dissatisfied with the Judgment rendered, that he claims denial of due process.

ARGUMENT

Having failed to object at the trial level, Petitioner should be estopped from raising the question of denial of due process. The United States Court of Appeals, Fifth Circuit, in its written opinion in this case, 488 F.2d 863, specifically ruled upon this issue. At page 864, that Court stated:

> "In the absence of exceptional circumstances where a miscarriage of justice would result, a condition not present here, questions that were not presented to or passed on by the trial court will not be considered on appeal. Wisconsin Barge Line, Inc. v. Coastal Marine Transport, Inc., 414 F.2d 872 (5th Cir., 1969); B & G Electric Co. v. G. E. Bass & Co., 252 F.2d 698 (5th Cir., 1958). *See also* J. F. White Contracting Co. v. New England Tank Industries, 393 F.2d 449 (1st Cir., 1968). D. H. Overmyer Co. v. Loflin, 440 F.2d 1213 (5th Cir., 1971)."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should deny the Petition For Writ of Certiorari sought in this action.

Respectfully submitted,

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